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80-1877

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FELICE CASSESSE,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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QUESTION PRESENTED FOR REVIEW

Are the petitioner's federal constitutional rights of due process and protection against double jeopardy and cruel and unusual punishment abridged by the combined effect of the New York statutory scheme under sections 265.02(1) and (4) and 70.06 of the New York State Penal Law, which in effect make a misdemeanor crime a felony because of a prior criminal conviction and thereafter subject the petitioner to increased punishment as a second felony offender based upon the same prior criminal conviction?

LIST OF PARTIES

The parties to the instant proceeding are Felice Cassesse, the petitioner, and The People of the State of New York, as respondent.

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OF THE STATE OF NEW YORK

To the Honorable The Chief Justice, and
Associate Justices of the Supreme Court
of the United States:

OPINIONS BELOW

The opinion of the Honorable

Justice John J. Leahy of the New York State Supreme Court denying the petitioner's motion to declare the New York statutes unconstitutional as applicable to the petitioner is not officially reported. A copy is set forth in Appendix A. The Appellate Division's affirmance of the petitioner's conviction was without opinion and a copy of the order is set forth in Appendix B. The order of the New York Court of Appeals denying leave to appeal is set forth in Appendix C. The Appellate Division and New York Court of Appeals' orders have not yet been officially reported.

JURISDICTIONAL GROUNDS

The order of the Appellate Division, Second Department, affirming the petitioner's conviction was entered on

March 9, 1981. The order of the New York Court of Appeals denying leave to appeal was dated April 21, 1981. The petitioner is therefore timely filing this application for a writ of certiorari and jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions involved in this case are the Fifth, Fourteenth and Eighth Amendments to the United States Constitution. Statutes involved are sections 265.02(1) and (4) and 70.06 of the New York State Penal Law.

STATEMENT OF THE CASE

In the case at bar, the petitioner was found guilty after a trial by jury of

possessing a loaded weapon in his place of business, to wit: a gas station, on February 12, 1979. Under the applicable New York statutes, this possession would have constituted a misdemeanor crime for which the maximum penalty was one year in jail and which also provided for the possibility of a non-incarcerating sentence such as a fine, probation or a conditional discharge. Because the petitioner, however, had previously been convicted of a felony crime in November of 1973, the New York statutory scheme under section 265.02(1) and (4) raised the level of the crime committed to that of a felony, and after the petitioner's conviction he was sentenced as a second felony offender again based upon the 1973 conviction. The petitioner's 1973 conviction, for which he was tried, convicted and served his time, thus again became an element of

the crime charged under section 265.02 and was again considered at the time of the imposition of sentence. The combination of the two New York statutes: sections 265.02(1) and (4) and 70.06 of the Penal Law, thus combine to unconstitutionally deprive the petitioner of due process and violate the constitutional protections against double jeopardy and cruel and unusual punishment. The petitioner raised this issue at the time of his sentence on March 19, 1980, the relevant portions of which are included in Appendix A. The issue was again raised in the Appellate Division in the appellant's brief and was reviewed by the New York Court of Appeals during their consideration of the petitioner's application for leave to appeal. This Court, in several recent cases, has indicated that the New York statutory scheme as applied

to the petitioner herein is constitutionally defective. In Whalen v. United States, ___ US ___, 100 S.Ct. 1432 (1980), this Court specifically stated:

> "The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense but also against multiple punishments for the same offense."

Citing North Carolina v. Pearce, 395 US 711 (1969); Brown v. Ohio, 432 US 161 (1977).

In Busic v. United States, ___ US ___, 100 S.Ct. 1747 (1980), this Court stated:

> "In our view Simpson's language and reasoning support one conclusion alone — that prosecution and enhanced sentencing under section 924(c) is simply not permissible where the predicate felony statute contains its own enhancement provision."

Citing: Simpson v. United States, 435 US 6 (1978).

Further, in a decision decided on May 5, 1981, this Court again indicated the applicability of the double jeopardy concept to the area of sentencing. See Bullington v. Missouri, No. 79-6740.

The exact issue presented in this application for Writ of Certiorari has not been previously determined by this Court. In view of the direction of the above-cited cases, this case offers this Court a unique opportunity to further elaborate on the applicability of the double jeopardy provisions to the factors herein, as well as to discuss the due process and cruel and unusual punishment aspects of the case. These issues appear to have been addressed by lower court decisions in the state and federal courts but have received no definitive ruling from this Court. See People v. Vernon, 83 Misc 2d 1025 (S.Ct., New York County,

1975); Goodloe v. Parratt, 605 F2d 1041 (8th Cir., 1979). Thus in Goodloe, supra, at page 1047, the Court remarked:

> "...we have been unable to find any federal cases which consider challenges under the United States Constitution to stacking a specific subsequent offense penalty enhancement statute and a general habitual criminal statute upon one another in sentencing for a single offense."

In the case at bar the petitioner received a mandatory two to four-year prison sentence. He received such a sentence solely because of his prior 1973 conviction. Other persons who would have been convicted of the same crime but who had no prior felony conviction would have received no more than a maximum of one year and would have been eligible for a non-incarceration sentence of a fine, conditional discharge or probation. The New York statutory scheme thus violates concepts of due process and subjects the

petitioner to double jeopardy and cruel and unusual punishment. This case thus presents this Court with a unique opportunity to elaborate on the issues raised.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A -

ARGUMENT AND OPINION IN THE NEW YORK STATE SUPREME COURT REGARDING QUESTION PRESENTED (HON. JOHN J. LEAHY, MARCH 19, 1980)

MR. RUBENSTEIN: I have an objection to that proceeding for the following grounds. I object because I feel that the arraignment of Mr. Cassese as a predicate felon on this particular case is a violation of his constitutional rights as cruel and inhumane punishment.

If Your Honor will recall, and I am sure Your Honor does, the reason that this crime became a felony is because of that same prior conviction. So, in fact, if Felice Cassese had he not been previously convicted in 1973 by his own plea of guilty to a prior felony, he would have stood before this court charged solely with a misdemeanor, because the

weapon in question was in fact possessed in his place of business where he worked uncontroverted, no question about it, not beyond a reasonable doubt, but beyond any doubt that he was an employee of the gas station, and he had a weapon and the Legislature in this State has made a distinction that I think is fair between people that possess weapons and those that possess weapons in their home or place of business, because this is a gas station that had been victimized by criminal activities on a number of occasions which gives substance to the legislature's distinction.

So, Cassese charged with a crime would otherwise be a misdemeanor or now he is charged with a felony, because of his prior involvement. That same felony is now used a second time to make him a predicate felony offender for which he

must mandatorily receive prison time.

It seems to me, Your Honor, respectfully, that the law that applies to Felice Cassese in this type of case seems cruel and unusual that he should be twice punished for the same prior act for which he went to jail for three years in 1973.

I am now contesting the question of whether or not the prior conviction should be the basis of a predicate felony because I think the law presently in the State is that it should but apply to this type of case where they elevate a crime first to a felony and now say now that you are a felony, we have to give you a mandatory minimum of two to four. I think that concept is unfair, unreasonable and cruel, and inhumane, and I ask Your Honor respectfully under these facts and circumstances to declare the law unconstitutional as it applies to this

particular case.

THE COURT: Mr. Nolan?

MR. NOLAN: Well, Judge, I would oppose defense counsel's motion. As a matter of fact, I think part of Mr. Rubenstein's argument was answered yesterday by the United States Supreme Court decision and furthermore, I would point out I don't think anywhere in the law does it say that his prior conviction cannot be used for the dual purpose that we are using it for, and it is true it is being used for the dual purpose, but I don't see how it is cruel and unusual. I don't think Mr. Rubenstein's motion applies at all to the workings of this particular statute involved for one elevating it to the felony and now causing him -- because it is a prior felony conviction, it makes him a predicate felon.

THE COURT: Well, the Court is not familiar with yesterday's ruling by the United States Supreme Court that is mentioned by the District Attorney, but the Court does note, Mr. Rubenstein, the very issue that you raise on this sentence has already been ruled upon by the Appellate Courts of our State, and in particular the Appellate Division of our court, the Second Department in the case of People against Risso. It is about two or three years ago, and it was determined with respect to the very issue that you have raised here this afternoon.

MR. RUBENSTEIN: I know about yesterday's Supreme Court decision, but I was unfamiliar with Risso.

THE COURT: So the application made to the Court for the Court to declare the statute unconstitutional is without merit, and it is denied.

APPENDIX B -

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, MARCH 9, 1981

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 9, 1981

HON. VITO J. TITONE, Justice Presiding,
HON. DAVID T. GIBBONS,)
HON. FRANK D. O'CONNOR,) Associate Justices
HON. WILLIAM C. THOMPSON.)

The People of the State of New York,

Respondent,

v.

Felice Cassesse, Appellant.

In the above entitled action, the above named Felice Cassesse, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered March 19, 1980,

convicting him of criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence; and the said appeal having been argued by Spiros A. Tsimbinos, Esq., of counsel for the appellant, and argued by Aley Z. Alexander, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, on the law, by reversing the conviction of criminal possession of a weapon in the fourth degree and the sentence imposed thereon, and the said count is dismissed, and, as so modified, said judgment unanimously affirmed, and the case is hereby remanded to the Supreme Court, Queens County, for further

proceeding pursuant to CPL 460.50 (subd 5).

Enter:

IRVING N. SELKIN

Clerk of the
Appellate Division

APPENDIX C -

OPINION OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK
DENYING LEAVE TO APPEAL

BEFORE: HON. SOL WACHTLER,

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

FELICE CASSESSE

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permis-

sion to appeal is hereby denied.

Dated at Mineola, New York
April 21, 1981

s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, Queens, March 19, 1980; modified, on the law, and as so modified, judgment affirmed and case remanded to Supreme Court, Queens for further proceedings pursuant to CPL 460.50 (subd 5).

APPENDIX D -

NEW YORK STATE PENAL LAW

§ 265.02 Criminal possession of a weapon in the third degree

A person is guilty of criminal possession of a weapon in the third degree when:

(1) He commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or

(2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or

(3) He knowingly has in his possession a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a

crime or misrepresenting the identity of such machine-gun or firearm; or

(4) He possesses any loaded firearm. Such possession shall not, except as provided in subdivision one, constitute a violation of this section if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the third degree is a class D felony.

§ 70.06 Sentence of imprisonment for second felony offender

1. Definition of second felony offender.

(a) A second felony offender is a person who stands convicted of a felony defined in this chapter, other than a class A felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this

subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sen-

tence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the narcotic addiction control commission, shall be deemed to be a sentence;

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the present felony shall be excluded and such ten year period shall be extended

by a period or periods equal to the time served under such incarceration;

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second felony offender the court must impose an indeterminate sentence of imprisonment. The maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

3. Maximum term of sentence. The

maximum term of an indeterminate sentence for a second felony offender must be fixed by the court as follows:

(a) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;

(b) For a class C felony, the term must be at least six years and must not exceed fifteen years;

(c) For a class D felony, the term must be at least four years and must not exceed seven years; and

(d) For a class E felony, the term must be at least three years and must not exceed four years.

4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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Question Presented for Review

Are the petitioner's federal constitutional rights of due process and protection against double jeopardy and cruel and unusual punishment abridged by the combined effect of the New York statutory scheme under sections 265.02 (1) and (4) and 70.06 of the New York State Penal Law, which in effect make a misdemeanor crime a felony because of a prior criminal conviction and thereafter subject the petitioner to increased punishment as a second felony offender based upon the same prior criminal conviction?

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Introduction

This is a brief in behalf of the respondent in opposition to a petition for a writ of *certiorari* to an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Opinion Below

The opinion of the Honorable Justice John J. Leahy of the New York State Supreme Court denying the petitioner's motion to declare the New York statutes unconstitutional as applicable to the petitioner is not officially reported. The Appellate Division's affirmance of the petitioner's conviction was without opinion. The New York Court of Appeals denied leave to appeal. The Appellate Division and New York Court of Appeals' orders have not yet been officially reported.

Jurisdiction

The jurisdiction of this Court to review by way of *certiorari* is invoked under 28 U.S.C. §1257, subd. 3, and Rule 19 (1) (a) of the Rules of this Court.

ARGUMENT

The petition should be denied because the appeal below was correctly denied.

Petitioner contends that the combination of two New York statutes, sections 265.02 (1) and (4) and 70.06 of the Penal Law, deprive a defendant of due process and violate the constitutional protections against double jeopardy and cruel and unusual punishment. He asserts that this is so because, in his case, a prior felony conviction was used both to raise the possession of a weapon from a misdemeanor to a felony and as the basis for sentencing him as a second felony offender. This position is without merit.

Under New York Law, possession of a firearm is a misdemeanor, the maximum sentence being one year in jail. Penal Law §§265.01, 70.15. However, when a defendant has been previously convicted of any crime, possession of a firearm constitutes a class D felony, the maximum term for which is seven years in prison. Penal Law §§265.02 (1) and (4), 70.00. Such a person may be sentenced as a second felony offender when he has previously, within ten years of the present conviction, been sentenced in any jurisdiction for an offense for which a term of imprisonment of more than one year was authorized and is authorized in New York. Penal Law §70.06.

It is well settled that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge. *Ogler* v. *Boles,* 368 U.S. 448, 451 (1962).

In the instant case, the level of the offense was raised because petitioner was previously convicted of a crime, which may be either a felony or a misdemeanor. Because that crime was a felony, the sentence was enhanced pursuant to New York Penal Law §70.06.

Whalen v. *United States,* 445 U.S. 684 (1980), cited by petitioner, is not applicable to the instant case. Whereas in that case consecutive sentences were imposed for offenses arising from a single criminal episode and this was found to be improper, in the instant case a single sentence was imposed upon petitioner. This sentence was enhanced because petitioner was previously convicted of a felony.

Petitioner in his papers cites *Busic* v. *United States*, —— U.S. ——, 64 L. Ed. 2d 381, 100 S. Ct. 1432 (1980) for the proposition that prosecution and enhanced sentencing under one statute is not permissible where the predicate felony statute contains its own enhancement provision. This, however, is inapposite to the instant case wherein the charge is enhanced by the fact that a defendant was previously convicted of a crime (felony or misdemeanor), and sentence was enhanced by the fact that he had been sentenced for a felony within ten years of the present conviction.

The New York statutory scheme is rational in that the state has a greater concern in keeping illegal weapons out of the hands of convicted criminals than from the hands of other persons, and an even greater concern in keeping them out of the hands of convicted felons than from persons convicted of lesser offenses. Therefore, it is clear that petitioner is incorrect in his claim that the New York statutory provisions denied him due process or violated his constitutional protections against double jeopardy and cruel and unusual punishment.

Conclusion

The petition for a writ of *certiorari* should be denied in all respects.

Respectfully submitted,

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